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Employment Tracker

DECEMBER 2023

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With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

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Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Questioning the evidentiary value of a disability certificate in the event of a violation of the Incapacity for Work Directive	28.06.2023 - 5 AZR 335/22 -	**Depending on the circumstances of the individual case, the evidentiary value of a disability certificate pursuant to Sec. 5 (1) sentence 2 of the German Continued Remuneration Act (EFZG) may be undermined even if the issuing physician has violated certain provisions of the Incapacity for Work Guidelines.** *This was decided by the 5th Senate of the Federal Labour Court in June of this year and the reasons for the decision were recently published.* Facts The defendant employer terminated the plaintiff's employment with notice as of September 30, 2020. The plaintiff was unfit for work in the period from September 7, 2020, to September 30, 2020, and submitted two certificates of incapacity for that reason. The defendant did not pay any sick pay for the period of incapacity, which the plaintiff now claims in his lawsuit. The Defendant contends that the evidentiary value of the submitted certificates of incapacity for work is undermined because they were not issued in accordance with the provisions of the Incapacity for Work Guidelines.

Decision of the Federal Labour Court

The defendant employer's appeal was ultimately unsuccessful. Nevertheless, the Federal Labour Court provides valuable comments on the undermining of the evidentiary value of a certificate of incapacity for work in the event of a violation of the Incapacity for Work Guidelines.

The Fifth Senate states that the probative value of a certificate of incapacity for work pursuant to Sec. 5 (1) Sentence 2 EFZG may also be undermined, depending on the circumstances of the individual case, if the issuing physician violates certain provisions of the Incapacity for Work Guidelines. Not all provisions of the Incapacity of Work Guidelines are relevant in determining whether the probative value of a medical certificate has been undermined. According to the Federal Labour Court, the provisions in Sec. 4 and Sec. 5 of the Incapacity for Work Guidelines, which refer to medical findings for a reliable determination of incapacity for work, contain a summary of general rules of medical experience and basic rules for a valid determination of incapacity for work. They reflect the generally accepted state of medical knowledge. According to the life experience and expertise of the legislator of the Incapacity for Work Guidelines, violations of these rules could be suitable to undermine the evidential value of a certificate of incapacity to work.

A violation of the requirement in Sec. 5 (1) of the Incapacity for Work Guidelines to replace symptoms such as fever or nausea with a diagnosis or suspected diagnosis after no more than seven days could, in conjunction with the duration of the certified incapacity for work, cast doubt on the accuracy of the certificate.

In the specific proceedings, however, there was no violation of the provisions of the Incapacity for Work Guidelines that would have destroyed the value of the evidence.

Effectiveness of a fixed-term employment contract without material basis **Requirements for compliance with the written form requirement in the**	16.08.2023 - 7 AZR 300/22 -	**The written form requirement for a fixed-term employment agreement pursuant to Sec. 14 (4) of the German Part-Time and Fixed Term employment Act (TzBfG), is generally met even if the start date of a fixed-term employment agreement that was initially concluded with formal validity is subsequently changed. The start date of a fixed-term employment relationship only requires written form if it is decisive for determining the end date.**

event of a subsequent change to the fixed term

The 7th senate of the Federal Labour Court decided this. The corresponding reasoning was recently published.

Facts

It was disputed whether the requirement of written form pursuant to Sec. 14 (4) TzBfG is also met when a fixed-term employment contract is initially concluded with formal effect and the start date is subsequently changed.

The plaintiff signed a fixed-term employment contract with the defendant employer, according to which the plaintiff was to be employed on a fixed-term basis for the period from May 15, 2019 to September 30, 2019.

Subsequently, the parties orally agreed to start work earlier. The plaintiff was then sent the new version of the fixed-term employment contract with a revised start date, which the plaintiff did not sign and return. As agreed, the plaintiff began work on May 4, 2019.

The plaintiff contends that the employment relationship between the parties was not terminated upon the expiration of the fixed term, but continues. According to the plaintiff, the fixed-term agreement in the employment contract does not comply with the requirement of written form, as the start of work contained in the signed contract does not correspond to the actual start of work.

The defendant is of the opinion that the fixed-term agreement was made in a formally valid manner. Only the agreed end date of the fixed term was required to be in writing.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the defendant. In the opinion of the 7th Senate, the disputed fixed-term employment agreement satisfies the written form requirement of Sec. 14 (4) TzBfG.

The Federal Labour Court essentially justified this decision by stating that bringing the start date forward does not affect the end date and therefore does not require the written form. The start date of a fixed-term employment contract only requires written form if it is decisive for determining the end date. It is always necessary for the end date to be clearly determined

	or determinable; accordingly, in the case of fixed-term employment contracts, either the termination date or the start date and duration of the contract are subject to the written form requirement. The extension of a fixed-term employment contract with a postponement of the termination date is also subject to the written form requirement, as this generally constitutes an independent fixed term. However, this does not apply to bringing forward the agreed start of a fixed-term employment contract - by specifying the termination date - and the associated "extension" of the contract term.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Crediting of granted vacation in dual employment relationship in the event of invalid notice of termination	05.12.2023 - 9 AZR 230/22 -	In dispute is whether the plaintiff must have the vacation granted to him by another employer during the legal dispute on protection against dismissal credited against his vacation claims against the old employer in corresponding application of Section 615 sentence 2 of the German Civil Code and Section 11 of the German Unfair Dismissal Act (KSchG). The plaintiff was dismissed by the defendant without notice. The Labour Court upheld the employee's action against this termination and ruled that the termination was invalid. In 2021, the defendant terminated the employment relationship again. The employment relationship of the parties was therefore terminated before the end of May 2021. During the ongoing proceedings for protection against dismissal, the plaintiff had taken up a new employment relationship with another employer. This employer granted the plaintiff vacation in the amount of 25 working days in 2020 and 10 working days in 2021 until the date of termination of the employment relationship with the defendant. The plaintiff is of the opinion that she is entitled to compensation for vacation against the defendant. In particular, the vacation granted by the new employer can only be offset against the vacation claims against the defendant with regard to her statutory minimum vacation entitlement. The action for the granting of compensatory leave was unsuccessful before the Labour Court and the Regional Labour Court (judgment of May 2, 2022 - 15 Sa 885/21). The Regional Labour Court gave the decisive reason that the plaintiff's vacation claims against the

		defendant had been completely fulfilled by the vacation days granted by her new employer in 2020 and 2021. The employee would have to have the vacation granted to him by the other employer during the termination dispute offset against his vacation entitlement against the old employer if he could not have fulfilled the obligations under both employment relationships at the same time. The plaintiff contests this with her appeal.
Calculating statutory leave entitlement for zeroed-out short-time and incapacity for work	05.12.2023 - 9 AZR 364/22 -	The Federal Labour Court has to decide how the suspension of the obligation to work on full working days due to short-time work (so-called short-time work zero) affects the calculation of the plaintiff's statutory vacation entitlement if he was also incapacitated for work during the period of the suspension of the obligation to work due to short-time work. The plaintiff, who was employed by the defendant employer, was entitled to 29 vacation days per calendar year. Due to the corona pandemic, the defendant's company introduced short-time work from April 1, 2020, until the end of 2020. During the period of short-time work, the plaintiff was incapacitated due to illness. The parties' employment relationship ended on January 31, 2021. The plaintiff argued that he had acquired statutory vacation entitlements for the period from April 1, 2020 to December 31, 2020. The short-time work regulation does not prevent this. In any case, his incapacity to work due to illness meant that the period in question had to be treated as if there had been days with a duty to work during this period. The defendant, on the other hand, was of the opinion that the individual contractual agreement on zero hours meant that no statutory holiday entitlement had accrued during this period. The plaintiff's simultaneous incapacity to work due to illness did not change this. The lower courts (including the Regional Labour Court of Schleswig-Holstein, judgment dated September 29, 2022 - 4 Sa 179/21) rejected the claim. In its reasoning, the LAG essentially stated that the scope of the vacation entitlement must be calculated taking into account the suspension of the obligation to work on full working days due to short-time work. This follows from §§ 1, 3 para. The fact that the plaintiff was also unfit for work during the period in question does not change this. According to the case law of the Federal Labour Court, there is no entitlement to statutory leave in periods of zero short-time work because

		there is no obligation to work. This also applies if the zero hours period coincides with an incapacity to work. In the opinion of the Regional Labour Court, the employee who is simultaneously incapacitated for work is to be treated in the same way as an employee who is not incapacitated for work and whose work schedule is also regularly changed on the basis of an employment contract agreement with respect to the accrual of statutory leave entitlements. The plaintiff appealed to the Federal Labour Court.
De facto employment relationship under Sec. 9, 10 of the German Temporary Employment Act (AÜG) **Illegality of the group privilege under Sec. 1 (3) No. 2 AÜG under European law**	05.12.2023 - 9 AZR 110/23 -	The Federal Labour Court decides whether an employment contract exists between the parties in the context of an intra-group assignment of employees. In particular, it is disputed whether the group privilege pursuant to Sec. 1 (3) sentence 1 No. 2 AÜG is contrary to European law. The plaintiff was employed by the defendant (a group company) within the framework of a group loan - initially for 18 months. The plaintiff's employment was extended for a further 5 months by means of a "contract for the supply of temporary workers within the framework of a group loan" between the "employer" and the defendant company. The plaintiff is of the opinion that an employment relationship exists between him and the defendant. In essence, he argues that the group privilege in Section 1 (3) No. 2 AÜG is contrary to European law. For this reason alone, an employment relationship exists with the defendant, as the maximum transfer period of 18 months has been exceeded. The defendant, on the other hand, is of the opinion that the prerequisites for a notional employment relationship between the hirer and the temporary worker pursuant to Sec. 9, 10 AÜG are not met due to the group privilege set forth in Sec. 1 (3) sentence 1 no. 2 AÜG. The lower courts (including the Higher Labour Court of Lower Saxony, judgment dated 12.01.2023 - 5 Sa 212/22) dismissed the complaint. With his appeal to the Federal Labour Court, the plaintiff is continuing to pursue his claim.

Replacement of the Works Council's Consent to the Hiring of an Employee **Informing the works council by means of electronic access to an applicant database**	13.12.2023 - 1 ABR 28/22 -	The parties dispute whether the submission of the required application documents within the meaning of Sec. 99 (1) sentence 1 of the Works Constitution Act (BetrVG) must be in paper form. Due to a planned new hire, the employer requested the consent of the works council formed at the employer pursuant to Sec. 99 BetrVG. The works council then informed the employer that it was not yet in a position to issue a final statement because it did not yet have all the information and documents necessary for its decision. After the requested documents had been made available, the works council refused to give its consent pursuant to Sec. 99 (2) No. 3 BetrVG (Works Council Constitution Act) because the recruitment would be detrimental to employees who were already employed, without this being justified for operational or personal reasons. The employer then initiated proceedings to have the consent of the works council replaced by the labour court. The works council was of the opinion that the procedure to replace the consent had not been properly initiated because the employer had not adequately informed the works council and, in particular, had not provided it with the application documents in paper form, so that the period pursuant to Sec. 99 (3) Sentence 1 BetrVG, had not even begun to run. Even if one assumes that the application was nevertheless properly initiated, the works council was justified in refusing to give its consent. Because of the intended recruitment, already employed employees were threatened with disadvantages in the form of a reduction in performance and workload. The employer argued that the works council had been fully informed about the planned recruitment. The works council had access to all application documents of all applicants. The employer uses a software program to record job advertisements and application procedures in which all application documents are entered digitally. There was no requirement to physically hand over the paper documents. Moreover, there was no reason to refuse consent. The lower courts (including the Saxony-Anhalt Regional Labour Court, decision dated October 13, 2022 - 2 TaBV 1/22) rejected the motions of the works council and replaced the

		consent of the works council to the hiring. The Regional Labour Court states that the procedure for replacing the consent was duly initiated in accordance with the requirements of Sec. 99 (1) BetrVG and that there was no sufficient reason for refusing the consent. In particular, the required application documents do not have to be submitted in paper form, but can also be submitted in such a way that the works council members, who have access to service laptops, are given comprehensive access to an applicant management tool in the course of being informed about an intended recruitment. The works council appealed against the decision of the lower courts to the Federal Labour Court.
Entitlement to continued payment of wages **Evidentiary value of a certificate of incapacity in the case of daily incapacity during the notice period**	13.12.2023 - 5 AZR 137/23 -	The parties disagree as to whether the evidentiary value of a certificate of incapacity to work in the case of daily incapacity to work with a notice period is also undermined in the case of termination by the employer. The plaintiff, who was employed by the defendant employer, was incapacitated for work and submitted a certificate of incapacity to the defendant. On the same day, the defendant duly terminated the employment relationship as of May 31, 2022. In two subsequent certificates, the plaintiff's continued incapacity for work was established until May 31, 2022. The defendant did not pay any continued compensation. By his lawsuit, the plaintiff requests the payment of continued compensation for the period of incapacity certified by a doctor. The plaintiff is of the opinion that the temporal coincidence between the notice period and the period of incapacity to work, which the Federal Labour Court cited in its decision of September 8, 2021 - 5 AZR 149/21 - to invalidate the evidentiary value of a certificate of incapacity to work, presupposes - if it is also to be applied to terminations by the employer - that the employee first receives the notice of termination and only then submits a sick note or a certificate of incapacity to work. The defendant countered that the evidentiary value of the certificate of incapacity was undermined by the fact that the entire remainder of the employment relationship had been covered by certificates of incapacity. The fact that the plaintiff had recovered only at the beginning of the new employment relationship after the end of the notice period also undermined its probative value.

		The lower courts (including the Higher Labour Court of Lower Saxony, judgment dated March 8, 2023 - 8 Sa 859/22) upheld the claim. The defendant is challenging this with its appeal to the Federal Labour Court.
Extraordinary dismissal for feigning inability to be vaccinated	14.12.2023 - 2 AZR 55/23 -	The Federal Labour Court decides whether the submission of a provisional vaccination certificate from the Internet can justify extraordinary termination. The plaintiff worked as a nursing assistant for the defendant employer. The defendant informed all employees that, pursuant to Sec. 20a (1) of the Infection Protection Act (IfSG), they must submit either proof of complete vaccination protection against the Corona virus, proof of recovery or a certificate of vaccination fitness. The plaintiff submitted to the defendant a certificate of provisional inoculation capability, which the plaintiff had acquired from the Internet against payment of a fee. There was no direct personal, telephone or digital communication with the doctor whose signature is printed on the certificate. Due to the defendant's conviction of the incorrectness of the submitted certificate, the defendant called in the health authority and, after hearing the works council, terminated the employment relationship extraordinarily, or alternatively extraordinarily with a social termination period. In her action, the plaintiff contests the extraordinary termination of her employment relationship. She is of the opinion that there is no extraordinary reason for termination. The defendant claimed that the plaintiff had deceived her by presenting a document that was obviously not based on a medical examination about a supposedly existing inoculation capability. This conduct irreparably destroyed the relationship of trust. The Labour Court granted the claim; the Regional Labour Court (Schleswig-Holstein, judgment of November 24, 2022 - 4 Sa 139/22) dismissed it. According to the reasoning of the Regional Labour Court, the acquisition of a provisional vaccination certificate from the Internet without a medical consultation/examination in person or at least by telephone and the presentation of such a certificate to the employer is to be seen as a significant breach of ancillary duties. Such behaviour constitutes an extraordinary reason for termination "per

		se". Such action in disregard of the requirements of Sec. 20a (2) Sentence 1 No. 3 of the Infection Protection Act remains a serious breach of duty even taking into account the fact that the plaintiff is afraid of the consequences of a vaccination. The plaintiff appealed against the decision of the Regional Labour Court to the Federal Labour Court.
Notification of Mass Dismissals **Invalidity of Dismissal as a Sanction for Violations of the Obligation under Sec. 17(1), (3) of the German Unfair Dismissals Act (KSchG)**	14.12.2023 - 6 AZR 157/22 -	The parties are in dispute as to the legal consequences of the employer's breach of its obligations under Sec. 17(1) and (3) of the German Unfair Dismissals Act (KSchG). The plaintiff and 10 other employees were dismissed for operational reasons after insolvency proceedings were opened in respect of the employer's assets. At the time of the insolvency application, the employer had 25 employees. The plaintiff contends that the dismissal was invalid because the employer failed to give the required notice of mass dismissal. The defendant insolvency administrator, on the other hand, is of the opinion that a mass redundancy notice was not required because the relevant size of the company, generally more than 20 employees, was not reached. The relevant date for determining the size of the company was the day of the dismissal. Before that date, however, 6 employees had already left the company. Both the Labour Court and the Regional Labour Court (Hamburg, judgment dated February 3, 2022 - 3 Sa 16/21) ruled in favour of the plaintiff. The defendant appealed this decision to the Federal Labour Court. In a decision dated May 11, 2023, the 6th Senate suspended the proceedings pending a decision by the European Court of Justice in a case already pending at that time (C-134/22). In its previous case law, the Federal Labour Court assumed that breaches of the employer's obligations in connection with collective redundancies lead to the nullity of the dismissal. This includes the obligation to give notice pursuant to Sec. 17(1) and (3) KSchG, so that dismissals without notice are invalid.

	As a result of the decision of the European Court of Justice of July 13, 2008, the reason for suspension no longer applies, so that the proceedings before the Federal Labour Court will now be resumed.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Package of measures adopted to improve labour market integration	01.11.2023	On November 1, the Federal Cabinet approved a package of measures to facilitate access to the labour market for asylum seekers and tolerated persons. This was announced in a press release by the Federal Ministry of the Interior. The following new regulations are planned to facilitate access to the labour market for asylum seekers and tolerated persons: ▪ The work prohibition for refugees living in initial reception facilities will no longer apply after six months. ▪ In future, tolerated persons will generally be granted a work permit. ▪ The existing possibility of obtaining a longer-term tolerated residence permit for employment will also be granted to those who have entered Germany by the end of 2022. ▪ In order to mobilize more workers for the labour market, the required pre-employment period will also be reduced to 12 months. ▪ To enable as many people as possible to find employment, the required minimum weekly working hours will be reduced from 36 to 20 hours.
Government draft on new regulation of works council remuneration	03.11.2023	The draft of a second law to amend the Works Constitution Act is intended to change the remuneration of works councils and thus eliminate the legal uncertainty that exists in practice when determining the remuneration of works council members. The bill proposes the following changes: ▪ In order to clarify the current legal situation, both Sec. 37 (4) and Sec. 78 Sentence 2 of the Works Constitution Act (BetrVG) are to be updated in accordance with the principle of honorary office. A more precise regulation is intended to reduce the risk of violations

		of the prohibition of discrimination and preferential treatment under the Works Constitution Act by bona fide employers and officials. ▪ This is not intended to create any new or additional claims for compensation.
Draft of a law to amend the Evidence Act	07.11.2023	The CDU/CSU parliamentary group recently published a draft bill to amend the law on proof of the essential conditions applicable to an employment relationship. <u>The draft bill provides for the following changes:</u> ▪ Employers are to be given the option of providing and transmitting the essential terms and conditions of employment within the meaning of the Evidence Act to employees either in writing or in electronic form, provided that the information is accessible to the employee, can be stored and printed out and the employer receives proof of transmission or receipt. ▪ The protection of employees should not be reduced.
Cabinet adopts 4th Minimum Wage Adjustment Ordinance	15.11.2023	According to a press release from the Federal Ministry of Labour and Social Affairs, the Federal Cabinet adopted the Fourth Minimum Wage Adjustment Ordinance on November 15, 2023. <u>The ordinance contains the following changes:</u> ▪ The statutory minimum wage will initially be raised to EUR 12.41 gross per hour on January 1, 2024. ▪ On January 1, 2025, the minimum wage will rise to EUR 12.82 gross per hour. The regulation is to come into force on January 1, 2024.

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